In the High Court of Judicature at Madras

Dated: 04/12/2003

Coram

The Honourable Mr. Justice P.SATHASIVAM
and
The Honourable Mr. Justice M.THANIKACHALAM

Crl. Appeal No. 334 of 1995

Arumugam ... Appellant

-Vs-

State by Inspector of Police
Namakkal Police Station. ... Respondent

Appeal against the order of life imprisonment passed by the learned Principal District and Sessions Judge, Salem dated 27.4.93 in S.C. No.34/93.

!For Appellant :: Mr.S.Ashokkumar

^For Respondent :: Mr.V.Jayaprakash Narayanan,
Government Advocate (Crl.side)

:JUDGMENT

M.THANIKACHALAM, J.

The accused in S.C. No.34/93 on the file of Principal Sessions Judge, Salem is the appellant.

2. The accused/appellant was directed to face the prosecution, for the offence under section 302 IPC on the ground that he had committed the murder of his brother's wife, by name Pushpa, on 29.9.91 with an intention to commit murder, by causing cut injuries, at about 12 noon.

3. Upon considering all the materials placed before him, the learned Principal Sessions Judge satisfied himself, to proceed further after framing the charge against the accused. The accused refused to plead guilty, when the charge was explained to him, thereby compelling the prosecution to make out a case, for his conviction.

4. On behalf of the prosecution, to prove the charge, 16 witnesses have been examined, seeking aid not only from 23 exhibits, but also

from material objects. The scanning and the weighing of the above materials, in its proper perspective, revealed the fact that the accused had committed the murder of his brother's wife by using M.O.12, causing cut injuries. Thus, concluding the learned trial Judge, by his judgment dated 27.4.93, convicted and sentenced the accused under section 302, IPC to undergo life imprisonment, which is in challenge before us.

5. Facts in brief leading to the conviction:- The accused is the younger brother of Thiru Boomi Udaiyar (PW1). PW1 married one Pushpa, as his second wife after the demise of the first wife, by name Pappathi. PW1 has a son and a daughter through the first wife. The son's name is Kesavamurthi, and the daughter is Sasikala (PW2). They are all residing in the same house.

6. The accused had illicit intimacy with the wife of PW1 and the same was one day witnessed by PW1, when they were in a compromising mood. In order to solve the dispute, PW1 convened a panchayat which was presided by Murugesa Udayar (PW5) on 28.9.91. In the panchayat, PW4 □ Pachamuthu also participated since he was present when the dispute had arisen between the parties on 26.9.91. In the panchayat, the accused and Pushpa were called and after discussion, the accused was directed to pay a fine of Rs.300/-, with warning to discontinue their illegal activities, which caused irksome to the accused, resulting warning also, to Pushpa aiming her life. When this behaviour of the accused was noticed by PW5, he also warned him to behave properly, at least thereafter. The accused felt that he was put to shame, before the panchayatdars and decided to take vengeance.

7. On 29.9.91, PW1 went to the lands for his day-to-day work. PW2 and her step-mother namely, Pushpa were in their house, and it seems Pushpa was in the cattle shed. The accused came there, at about 12 noon in M.O.13 cycle, having koduval M.O.12 hanged in the handle bar. It was witnessed by Parvathi (PW3). The accused assaulted Pushpa, causing multiple cut injuries, which was witnessed by PW2. PW2 immediately informed the same to his father PW1. The accused after assaulting Pushpa returned in the same cycle (MO13) which was also witnessed by PW3. At about 12.30 pm on the same day, when PW8 was doing his agricultural work the accused went there. By seeing the blood stain in the dress, when PW8 questioned, the accused confessed about his act namely, cutting the wife of his brother. Thereafter, leaving the cycle with the custody of PW8, informing him, that he is proceeding to Kollimalai, the accused left the place of PW8.

8. On information by PW2, when PW1 went to the scene of crime he noticed the dead body of his wife, and therefore, in order to have redress he approached the police at about 2 pm.

9. Thiru Chinnathambi, the then Sub Inspector of Police, Erumapatti police station, on the basis of the information furnished by PW1, reduced the same into writing (Ex.P1) and on that basis he registered a case in Crime No.391/91 under section 302 IPC, for which he submitted the printed FIR Ex.P21 to the court concerned, marking a copy also to the Inspector of Police for investigation.

10. Thiru Muthusamy (PW16) on information went to Erumapatti police station and obtaining a copy of the printed FIR, reached the scene of crime, inspected the premises, in the presence of the witnesses and prepared observation mahazar Ex.P2, as well as sketch Ex.P22 in addition to making arrangement for photos, being taken through PW10. Between 4.30 and 8.00 pm, PW16 conducted inquest in the presence of panchayatdars as well as examined the witnesses, and the result is Ex.P23 inquest report. To ascertain further, the actual cause of death, the body of Pushpa was sent for postmortem with a requisition Ex.P16, through PW14, from the place of crime. PW16 in continuation of the investigation seized M.Os.7, 9, 10 & 11 in the presence of the witnesses under the cover of mahazar Ex.P3.

10. On 30.9.91 at about 11 am as per the request made by the investigating officer under Ex.P14, PW12 conducted an autopsy over the body of Pushpa which revealed the following external injuries:
(1) Incised injury of about 15 cm x 3 cm x bone deep over the right side of the face starting from the angle of the right eye running backwards to the back of the mastoid region, the muscles and the bone underneath are cut through on exploration clotted blood seen.
(2) Incised injury of about 15 cm x 4 cm x bone deep about the left ear to the back of the neck. On exploration the muscles and the bone underneath are cut through, blood clots are also seen.
(3) An incised injury of about 10 cms x 3 cms x bone deep starting from the chin running backwards to the right side of neck exposing the cut ends of muscles and vessels in the neck on exploration clotted blood seen.
(4) Incised injury of about 15 cms x 7 cms x bone deep from the lateral end of injury No.3 running backwards to the left side and join with the injury No.2 the severed ends of muscles and bones all seen through clotted blood is seen on exploration.
(5) A small abrasion of about 1 cm x 1 cm over the right side chest.

The doctor analysing the above injuries and the damage caused by those injuries, internally, was of the opinion that the deceased died due to shock and haemorrhage caused by multiple injuries, which are incorporated in Ex.P15.

11. On 30.9.91 at about 6 am the Village Administrative Officer, PW7 was in his office with one Karunanidhi. At that time the accused came there and confessed, that he had committed the murder of his brother's wife, due to the previous enmity as well disclosing the concealment of the weapon etc. This was reduced into writing by PW7, as Ex.P4 in which Karunanidhi also signed. Thereafter he handed over the confession statement Ex.P4 to the Inspector of Police, along with the accused.

12. The investigating officer PW16, at about 8 pm on 30.9.91, on the surrender of the accused through the Village Administrative Officer, along with Ex.P4, arrested him and further enquired. The accused voluntarily gave a confession statement (Ex.P5), disclosing the place where the weapon is concealed, in the presence of PW7 and another witness. PW16 noticed the blood stain, in the shirt and dhoti worn by the accused (M.Os.15 and 14), which were recovered under Ex.P8. In pursuance of the confession statement, M.O.12 koduval was also recovered by PW16, under Ex.P6. Thereafter, he has also

identified the cycle which was recovered from PW8, under Ex.P7. Examining the other witnesses recording their statements, concluding the investigation, the material objects seized were also sent for chemical examination. In addition, PW16, made arrangements for recording section 164 statements of the witnesses, through PW11 Judicial Magistrate, Rasipuram. The entire investigation so done by PW16, brought to surface the guilt of the accused and in this view he laid a final report before the appropriate court, leading to trial culminating in a conviction as stated above, giving a cause of action for the appellant, to prefer this appeal. In this way the judgment of conviction and sentence of the trial court is in challenge before us.

13. Heard Mr.S.Ashokkumar, learned counsel appearing for the appellant and Mr.V.Jayaprakash Narayanan, learned Government Advocate for the State, who took pain of taking us through the oral evidence as well as the documentary evidence, to dwell upon the matter, for deep consideration.

14. The learned counsel for the appellant attacked the trial court verdict mainly on the following grounds:
(1) The alleged motive is not at all proved and even if proved, that could not be the cause for the murder;
(2) that the only alleged eye witness PW2 turned hostile, because of the fact she could not have seen the incident;
(3) that the alleged extra judicial confession said to have been given by the accused to PW7 is a myth and the alleged extra judicial confession must be the handy work of the police, which could not be the basis for conviction under law since inadmissible also; and
(4) that the accused was seen near the scene of crime sought to be introduced through PW3 is an imagination. On these lines, the learned counsel urged that the trial court without properly appreciating the case, erroneously convicted the accused, failing to give at least the benefits of doubt, which should be made available to him at least in this court, thereby acquitting from the charges.

15. Learned Government Advocate (Crl. Side) would contend that though PW2 turned hostile there are unimpeachable circumstantial evidence, encircling the accused in proving the crime, that there is no reason of any kind to discard the extra judicial confession given by the accused before the Village Administrative Officer which could form the basis for conviction, since corroboration is available in plenty from the other circumstances also. In this view, he supports the reasonings, findings and conviction rendered by the trial court.

16. The accused is the younger brother of PW1. PW2 is the daughter of PW1 and the deceased Pushpa. PW4 and PW5 are the neighbours. It is also an admitted fact, that the accused and the deceased were living in the same house in different portion. The first wife of PW1 by name Pappathi and the wife of the accused are sisters. The second wife of PW1, Pushpa, was murdered on 29.9.91 at about 12 noon, when she was in her cattle shed. It is the case of the prosecution that the accused alone had committed the murder by cutting her with MO12, which was witnessed by PW2. Unfortunately for the prosecution and we could say, fortunately for the accused, PW2 failed to

support the case of the prosecution. The fact that Pushpa was murdered, informed by PW2 to PW1, is not in dispute. PW2 would state that her stepmother was done to death by Kesavamurthi, her brother, who was also present in the house on that day, though he was working elsewhere, as cleaner. Thus, PW2 had tilted the case, informing that Kesavamurthi is the cause for the death. Kesavamurthi being the son of the deceased, as well as PW1, the prosecution ought to have examined him, as a witness to rule out the possibility of himself, involving in this incident, that too, because of the evidence given by PW2 since circumstantial evidence is relied on. But, unfortunately Kesavamurthi is not examined. Be that as the case may be, the fact remains PW2 turned hostile. The reason alleged by the prosecution, for not supporting the case also, appears to be unacceptable. Admittedly, P.W.1 is the father of P.W.2 and the deceased is the mother. The accused is the junior paternal uncle of P.W.2 i.e. the brother of P.W.1. On the basis of the relationship, question of choosing the relation comes for consideration, generally it should be in favour of the father and the mother. But, P.W.2 disowned the prosecution case, though the prosecution say that accused had committed the murder of the mother of P.W.2. This would indicate P.W.2 had not witnessed the incident or if she had witnessed the incident as spoken by her, then the murder might have been committed by Kesavamurthi. Unfortunately, ignoring this aspect, the trial Court has taken a contrary view and believed the extra judicial confession, ignoring the account of eye witness. Thus the prosecution case is weakened, we could say, at least to certain extent.

17. PW11 had recorded the statements of witnesses under section 164 Cr.P.C. and they are also exhibited. But, unfortunately, after PW2 was treated hostile, the statement said to have been given by her, before the Judicial Magistrate, was not put to her, either for confirmation or denial. Therefore, the statement said to have been given by PW2, willingly, before the Judicial Magistrate became useless, the fact being the same is not the substantial evidence. In this view, the entire oral evidence of PW2 has been vanished. Therefore, the prosecution at present is mainly depending upon the circumstantial evidence, to prove the offence, supported by the extra judicial confession. Before scanning the above materials, we will find out the cause, for the death of Pushpa.

18. At the request of the investigating officer under Ex.P14, PW12 conducted autopsy over the body of the deceased Pushpa. The doctor had noticed five injuries, as narrated above. Out of five injuries, four injuries are incised wound and those injuries alone caused shock and haemorrhage, resulting the termination of the life of Pushpa prematurely. When the doctor had spoken about the injuries and the cause of death of Pushpa, as narrated in Ex.P15 also, the same is not challenged. The doctor also opined, that the injuries noted by him would have been caused by a weapon like MO12, which is also not challenged. Therefore, if the prosecution proves to the satisfaction of the court, inspiring confidence in the mind, that the injuries noted in Ex.P15 were inflicted by the accused using MO12, then there is no way for the accused, to escape from the clutches of section 302 IPC. On the other hand, failure to prove or if there is any possibility to infer, that the incident might have been taken otherwise also, then spontaneously a doubt would arise

and the accused would be entitled to his benefits under the criminal jurisprudence.

19. In a case of circumstantial evidence, the circumstances relied on by the prosecution, should encircle the accused leaving no scope or possibility for the accused to escape from the said circle. For this, there should be no crack or snap in the chain of events of circumstances. Even if one link is broken, then the possibility comes, automatically, for the accused to escape through that gap. In this case the circumstances mainly relied on by the prosecution are,
(1) there was enmity based upon motive between the deceased and the accused;
(2) that when the accused came to the scene of crime with M.O.12 in M.O.13, it was witnessed by PW3 as well as when he left the scene of crime, it was witnessed by him;
(3) that after the incident he confessed before PW8, and left the place leaving the cycle in the custody of PW8, which was later recovered on the confession of the accused;
(4) that the accused had given a confession before the Village Administrative Officer, which is generally called 'extra judicial confession', wherein he confessed the guilt;
(5) that in the dresses worn by the accused blood stains were noticed, immediately to the occurrence not only by PW8 but also at the time of arrest by the investigating officer; and
(6) that the weapon M.O.12 and the cycle M.O.13 were recovered, on the voluntary confession given by the accused. On the above circumstances, the learned Government Advocate would submit that the case is proved beyond all reasonable doubts.

20. In a case of circumstantial evidence the motive should play prominent and predominant role though it may not be so essential, where ocular evidence is available in plenty. It is the case of the prosecution, that the accused had illicit intimacy with the wife of PW1, and the same was noticed by him also. PW1 would state that he suspected the fidelity of his wife, since his wife returned with his brother in the same bus, though he left her at Ramuudayanur village for performing the 'nombu'. He would further state, that in the month of 'Adi' he has seen the accused and Pushpa lying together in a compromising mood. If this is the fact, what should be the natural reaction of a husband, is the question. The answer should be, he ought to have reacted and assaulted the accused or attempted to assault the accused and the wife, also questioning their conduct. Admittedly it is not happened, whereas a theory of panchayat is introduced, which appears to be highly unnatural. This theory was not disclosed to the Investigating Officer also when P.W.1 was examined, thereby showing that this must be an after thought. According to PW1 he convened a panchayat, which was attended to by PW4 and PW5. In the panchayat, it seems Pushpa has not supported the accused and therefore, it is the case of the prosecution, the accused has been aggrieved and decided to commit murder. The reasoning given so, appears to be flimsy and unnatural in our view. If the accused and the deceased had illicit intimacy, then Pushpa would not have disclosed the same before the panchayat and she would have taken all possible steps generally to save her paramour. Even assuming that Pushpa failed to support the accused, the grievance of the

accused must be against his brother-PW1, since he alone took the accused before the panchayatdars, thereby reducing his image since it is said panchayatdars imposed fine. Therefore, the evidence given by PWs.1, 4 and 5 that the accused warned Pushpa, even before the panchayatdars, appears to be some what unnatural and unacceptable to us. In this view, we conclude that this motive part alleged by the prosecution is flimsy and unacceptable. Assuming that the oral evidence of PW1 could be accepted, supported by PW4 and PW5, in our opinion, the motive is not connected with the subsequent events, and therefore, proof of motive alone will not take us to the irresistible conclusion, that the accused would have committed the murder of Pushpa, since we find so many grey area in the case of the prosecution, unexplained and unsupported by any acceptable evidence.

21. Ex.P1-complaint, given by PW1 set the law in motion. Admittedly PW1 is not the eye witness. Therefore, the statement recorded on the information furnished by PW1 could not be taken as true unless corroborated. It is the case of PW1 also, that on the information furnished by PW2, he came to know the involvement of the accused, in murdering his wife Pushpa. The person, who is said to have informed the actual incident, as aforementioned, turned hostile and thereby the chain is snapped. In this view, the averments in Ex.P1 would not support the case of the prosecution, except if at all the motive. In this view, though there is no delay in preferring the complaint, we are unable to accept the contents therein as correct and the averments in the complaint could not be treated as substantive evidence also.

22. Learned counsel for the appellant submits, that the case spoken to by PW3 that she had seen the accused just prior to the occurrence must be incorrect, appears to be correct, by going through her evidence. The incident took place on 29.9.91 Sunday. But PW3 would state that she had seen the accused 1 = years ago, in the month of ' Purattasi' on the second Saturday at about 12 noon. If the evidence is to be accepted as such it would indicate that PW3 might have seen the accused, not on the date of the occurrence, but previous to the date of the occurrence, which would not be sufficient to conclude, that he would have committed the murder of the deceased, on 29.9.91 Sunday at 12 noon. Even by way of re-examination, it is not clarified how PW3 has given the day as Saturday, the admitted fact being, the incident took place only on Sunday. She would state further, that the accused went in a cycle, having the koduval in the handle bar. She has neither identified the cycle, nor the koduval at the time of examination in chief. Only after the cross examination, when she was examined with the permission of the court, she had identified M.O.13, where also she failed to identify the koduval. She would state, that the accused, who crossed her, returned within 5 or 10 minutes. It is the case of the prosecution that M.O.12 was used, to cause cut injuries to the deceased Pushpa. Hence, if really PW3 had witnessed the incident, then she ought to have noticed the weapon with blood, which she has not spoken. Therefore, the evidence given by PW3, failed to substantiate the ' last seen' theory just prior to the incident, in order to indict the accused with the crime. Even assuming that PW3 has given the day, due to failure in memory as Saturday, instead of Sunday, in our opinion, in the absence of identification of the weapon, it is not possible to conclude that the accused

alone should have committed the murder of Pushpa that too, in the face of the statement given by PW2, that her brother Kesavamurthi had committed the murder. Further, she has also not identified the shirt and dhoti, worn by the accused at the time of the incident, which is sought to be introduced by the investigating officer, as if recovered with blood stains. In this view also the last seen theory automatically vanishes and on the basis of this circumstance connecting or roping the accused, with the crime is an impossibility.

23. On the basis of the extra judicial confession said to have been given by the accused to PW8 a case is sought to be made out. Learned counsel for the appellant submits that the oral evidence of PW8 is highly artificial and believing his evidence is unsafe. According to PW8, on 29.9.91 at about 12.30 pm the accused came to his land in the cycle and his dresses were seen with blood. On enquiry, according to PW8, the accused confessed to him, about the murder committed by him. If it is so, what should be the reaction of P W8 is the question. He also belongs to the same village and he is known to PW1 also. Therefore, his immediate reaction would have been to inform at least PW1 about the crime committed by his brother. But PW8 has not acted as a reasonable man expected to be, which would show the case spoken by PW8, that the accused had confessed about his guilt, must be the imagination of the investigating officer, through PW8. The inaction and the absence of immediate reaction on the part of PW8, prompt us to say that the accused would not have confessed to him, about the murder said to have been committed and that is why he had not acted as a prudent man, in not even reporting the matter, either to the police or to PW1 and our view is supported by the decision in Kali Ram v. State of Himachal Pradesh {(1973) 2 SCC 808} wherein the Supreme Court ruled that "if another witness came to know of the murder, his failure to make a statement to the police regarding the confession made by the accused to the witness would deprive his evidence of much of its value."

24. The strong piece of evidence relied upon by the prosecution is the extra judicial confession given by the accused to PW7 that is, Ex.P4. It is an admitted position, that extra judicial confession is a weak piece of evidence and unless it is corroborated by other unimpeachable circumstances; relying upon the extra judicial confession alone, convicting the accused would be unsafe. In this view, we have to see, when the extra judicial confession was given, what is the evidentiary value of the said extra judicial confession, whether it is corroborated and confirmed by other attending circumstances to have the sanctity.

25. Learned counsel for the appellant attacks the validity of Ex.P4 , mainly on two grounds namely; (1) that Ex.P4 would not have come into existence as indicated in the document, and it must be the handy work of the investigating officer, (2) that the extra judicial confession is hit by not only under Rule 72 of the Criminal Rules of Practice, but also under section 162 Cr.P.C. In this case F.I.R. was registered on 29.9.91 itself, thereby indicating investigation commenced on the same day, and it is the case of the

prosecution also. The Criminal Rules of Practice are framed by the High Court, in exercise of the powers conferred by Article 227 of the Constitution of India, with the previous approval of the Governor and therefore, generally it should have the enforcing effect. Rule 78 says "Village Magistrates are absolutely prohibited from reducing to writing any confession or statement whatever made by an accused person after the police investigation has begun." Thus it is seen, a prohibition is imposed upon the Village Magistrates from recording any statement that too, confession also. Admittedly in this case as spoken by PW7 the extra judicial confession was recorded on 30.9.91 at about 6 am, that is, after the investigation has begun. Therefore, Ex.P4 is hit by Rule 72. On this basis, the learned counsel for the appellant submits, that no reliance could be placed upon Ex.P4. On the other hand, learned Government Advocate relying upon a decision in Sakthivel v. State {(2003) M.L.J. (Crl.) 752) would contend, that the extra judicial confession is admissible in evidence and in this view, it is not possible to ignore the same in toto. In the above ruling, a Division Bench of this Court had taken a view, seeking support from the previous decisions also as under:

"The extra-judicial confession given by the accused to P.W.9, though was subsequent to the beginning of investigation, is not inadmissible in evidence, only its evidentiary value is reduced. Therefore, Ex.P-3 is admissible in evidence."

Here, the admissibility of the extra judicial confession namely, Ex. P4 alone is not in question and its genesis also questioned, in the sense the accused has not given the extra judicial confession and even if it is given, it is hit by section 162. Therefore, if at all it could be said on the basis of the above decision Ex.P4 is admissible in evidence and it is still open to test the evidentiary value of Ex.P4 subject to other conditions regarding admissibility under Section 162 Cr.P.C. In this view relying on Ex.P4 as such is not possible to sustain the conviction.

26. In re Lakshmanan (1971 M.L.J. Criminal 178) a Division Bench of this Court, had an occasion to consider Rule 72 of the Criminal Rules of Practice. It is held, the rule was intended to prevent false extra judicial confession being secured with the help of village munsif, after the commencement of the investigation. This safeguard provided under Rule 72, must be strictly construed, otherwise there is every possibility for the investigating officer to take this kind of extra judicial confession, from an obliging Village Administrative Officer, diverting the facts to certain extent, creating false evidence or twisted particulars to suit the case, according to the whims and fancies of the investigating officer, causing injustice. In the above ruling it is held by the Division Bench as follows: "Under Rule 72 of the Criminal Rules of Practice, the "Village Magistrates are absolutely prohibited from reducing to writing any confession or statement whatever made by an accused person after the police investigation has begun". It was intended to prevent false extra judicial confession being secured through the help of the village munsif, after the commencement of the investigation. The extra-judicial confession itself is a weak evidence, and its value becomes less when it is obtained by a person, in the position of the village munsif after investigation of the case by the police has started. But

on a careful examination of the relevant provisions relating to the matter, it is not possible to state it is illegal or inadmissible in evidence, though the weight to be attached to the same may be a relevant question for consideration on the facts and circumstances of each case."

27. In Raju & 2 others v. State, etc. (1995-2-L.W. (Crl.) 513) a Division Bench of this Court had ruled, that confession made to Village Administrative Officer, two weeks after the occurrence is unreliable. But, in our case the confession statement was said to have been recorded on the very next day, and therefore, if the confession statement is proved to be true, and genuine relying upon that statement may be permissible, to certain extent.

28. In Ganesan v. State rep. by Inspector of Police, Harur Police Station (2002-2-L.W.(Crl.) 746) a Division Bench of this Court has once again, ruled that though it is not possible to state that the confession statement recorded by the Village Administrative Officer is illegal or inadmissible, the probative value would depend on the facts and circumstances of the case. Thus making it clear a confession statement even could be recorded after the investigation has begun, despite the prohibition contained in Rule 72 and its probative value has to be tested, depending upon the facts and circumstances of the case.

29. The main thrust of the learned counsel for the appellant is, that even assuming that the Village Administrative Officers are not totally barred from recording an extra judicial confession by Rule 72, if the statements are recorded, after the investigation has begun, then it should be hit by section 162 Cr.P.C. Section 162 Cr.P.C. prohibits, totally the use of any such statements or any record thereof, whether any police diary or otherwise or any part of such statement or record to be used for any purpose save as provided under the proviso. Certainly Ex.P4 would not come under the proviso to section 162. It is the specific submission of the learned cou nsel for the appellant that Ex.P4 comes within the four walls of section 162 Cr.P.C. and for that purpose, much reliance is placed upon the decision in Kali Ram' s case cited supra {(1973) 2 SCC 808}. In the case involved in the above decision, a letter containing narration of facts relating to the crime addressed to a police officer, during the course of investigation was sought to be relied upon, to prove the guilt of the accused, where it seems he had confessed the crime. The letter was not obtained by the police, whereas it seems it was addressed from elsewhere to police officer but during the course of investigation. The Apex Court considering the effect of Section 162 Cr.P.C. laid down the law, which reads thus:

"The prohibition contained in Section 162 related to all statements made during the course of an investigation. The letter which was addressed by 'S' to Station House Officer was in the nature of narration of what, according to 'S' he had been told by the accused. Such a letter would constitute statement for the purpose of section 162, Cr.P.C. The prohibition relating to the use of statement made to a police officer during the course of an investigation cannot be set at naught by the police officer not himself recording the statement of a person but having it in the form of a communication addressed by the person concerned to the police officer. If a statement made by a

person to a police officer in the course of an investigation is inadmissible, except for the purposes mentioned in Section 162, the same would be true of a letter containing narration of facts addressed by a person to a police officer during the course of an investigation. It is not permissible to circumvent the prohibition contained in Section 162 by the investigating officer obtaining a written statement of a person instead of the investigating officer himself recording that statement."

According to the submission of the learned senior counsel for the appellant, the same analogy is applicable to the statement recorded by the Village Administrative Officer also, since Ex.P4 was recorded during the course of investigation. This view is to be taken, in order to prevent the investigating agency to circumvent the prohibition contained in section 162 Cr.P.C. In this view, though Ex.P4 was not recorded by the police officer, since the extra judicial confession is said to have been recorded during the course of investigation, we are of the opinion, Ex.P4 is hit by section 162 Cr.P.C. and in this view it is inadmissible in evidence which should follow, this could not be the strong piece of evidence, to inflict a conviction or to sustain the same.

30. It is pointed out by the learned counsel for the appellant that Ex.P4 extra judicial confession has not reflected the natural conduct of the accused and in this view also, the same should be ignored, placing reliance in a decision in Thangavelu v. State of T.N. (2002 SCC (Cri) 1382) in which the Apex Court has ruled as follows:

"A perusal of this confession Ext.P-14 gives us an indication of the attempt of the prosecution to build a case against this appellant. This extra-judicial confession is so full of facts starting from about 25 years prior to the date of the incident and graphically details what happened over these years to his sister and his family which actually is the motive suggested by the prosecution for the crime. Ext.P-1 4 is recorded in nearly 4 full pages, it not only speaks of his motive to kill D-1 and D-2 but also gives graphic details of the nature of the attack on the deceased and also mentions in detail the persons whom he saw during and after the incident. In a manner of speaking, if this confession is true the appellant had the foresight to guess as to who the prosecution witnesses are going to be and gives an impression, therefore, he was seeking to corroborate their future evidence. In our opinion, this would hardly be the natural conduct of an accused if he was voluntarily making a confession. We further notice the unimaginable similarity in Exts.P-14 and P-1 as also in the evidence of PW1 which supports the theory of the defence that there was an attempt by the prosecution to create evidence in this case."

This ruling is the answer for the observation in Sakthivel case {(200 3) M.L.J. (Crl.) 752}. In Sakthivel case a Bench of this Court observed that minute details had been given by the accused which were only to the exclusive knowledge of the accused and in this view it cannot be said that the same would have been written by the Village Administrative Officer himself. The Apex Court considering the minute details in the extra judicial confession, has taken the view that there was an attempt by the prosecution to create evidence in this case, is probable. In this view also Ex.P4 is clouded with shadow and requires eradication of the same, for its approval and its reliability, to act upon.

31. The learned counsel would contend that since the extra judicial confession viz., Ex.P.4 itself is not reliable or inadmissible, as the case may be, then the alleged recovery said to have been made on the basis of the extra judicial confession or on the basis of the disclosure statement, also should be held unacceptable, for which we have to subscribe our view. It is the case of the prosecution that in Ex.P.4 itself, the accused had disclosed about the whereabouts of the cycle, M.O.13 and the weapon M.O.12. But unfortunately, the investigating officer would state that he had examined the accused, recorded Ex.P.5 leading to the recovery of M.Os.12 and 13 under Exs.P6 & P.17. If Ex.P.4 is not available, question of Ex.P.5 also would not have come into existence. Our finding is that Ex.P.4 is inadmissible in evidence and therefore, the case projected on behalf of the prosecution that on the basis of extra judicial confession, another confession was obtained from the accused, leading to the recovery, is also not acceptable legally. Further, if the accused had disclosed about the whereabouts of cycle and weapon in Ex.P.4, subsequent, alleged confession also would be inadmissible. In this view, we conclude, the recovery spoken by P.W.16, though supported by P.Ws.7 and 8 is not acceptable to us and they are the documents prepared for the occasion having no evidentiary value.

32. The learned Public Prosecutor would contend that in the dress worn by the accused, Forensic Department have detected 'O' Group human blood as that of the deceased and therefore, it should be taken as strong circumstantial piece of evidence. This contention could be accepted if it is true that the shirt and dothi, M.Os.14 and 15 belonged to the accused and the accused was wearing these dresses at the time of the incident, otherwise it may not be possible to draw a presumption. P.W.3, who claims that she had seen the accused, going to the deceased cattle shed, has not identified these dresses, and P.W.8 who deposed that he had seen the blood stain in the dresses of the accused also, failed to identify these dresses and no attempt is made on behalf of the prosecution even to show these material objects, to these witnesses to identify the same. Here, it is not the admitted position that these dresses were recovered from the accused though claimed so. Though it is the case of the prosecution that bill hook was recovered on the basis of the confession given by the accused, it does not contain human 'O' Group blood, as seen from Ex.P.19, though it does contain human blood. Therefore, on the basis of presumption also, fixing this accused as the murderer is beyond our comprehension.

33. The trial Court in our considered opinion has not properly approached the case of the prosecution, taking into consideration the probability and other attending circumstances pointed out supra, whereas drawn a presumption on its own which is not warranted on the basis of the materials available. Because of the improper approach, the trial Court has committed an error, in convicting the accused and in this view, we are constrained to set aside the conviction.

34. For the foregoing reasons, the accused/appellant succeeds in establishing that the prosecution has not made out a case beyond all reasonable doubt, thereby making him fit for acquittal, at least on the basis of the benefits of doubt.

35. In the result, the appeal is allowed and the judgment of conviction and sentence is set aside and the accused is acquitted of the charge framed against him. The bail bond, if any, executed by the accused at the time of coming out on bail shall stand discharged.

Index : Yes
Website : Yes

kv

To
1. The Judicial Magistrate No.I, Namakkal.
2. -do- thro' the Chief Judicial Magistrate, Salem
3. The Principal District & Sessions Judge, Salem.
4. The Superintendent, Central Prison, Coimbatore.
5. The Public Prosecutor, High Court, Madras
6. The Inspector of Police, Namakkal Police Station,
7. The District Collector, Salem.
8. The Director General of Police, Mylapore, Chennai 4.